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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Review of the Commission's  
Regulations Governing Broadcast  
Television Advertising

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MM Docket No. 95-90

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## **SUMMARY**

The Broadcasters Coalition urges the Commission to retain the network advertising representation rule and the network control of station advertising representation rule (collectively the "network rep rule" or "rule"). Although the network rep rule may be almost fifty years old, it continues to serve the public interest. The changes in the video marketplace in the last fifty years have not undermined the purpose or effectiveness of the rule.

The network rep rule was designed to promote competition in the advertising marketplace. It plainly serves that purpose. Without the rule, networks would coerce affiliates to hire them as their representatives. This would lead to higher advertising prices as robust competition would be replaced with network-enforced cooperation and collusion in the sale of advertising.

The network rep rule also furthers the Commission's established goal of localism in broadcasting. Reps not only sell advertising, but recommend programming, providing stations with independent input as to the types and mix of programming that are appropriate for their individual communities. Allowing the networks to assume this role would undermine local stations' ability to be independently responsive to community needs. A network would never advise a station to preempt network programming.

Eliminating the network rep rule also would harm independent stations and network affiliates which desire to continue having independent representation. Without the rule, many independent rep firms will cease to exist and the ones that remain likely will have

few stations to represent, none in the major markets where networks will rep stations, and will have limited resources to provide quality service.

Antitrust laws would not be as effective as the rule in preventing anticompetitive behavior by the networks. The antitrust laws fail to target the rep function of program advising, and the expense and delay of successful antitrust suits makes such an option unattractive.

Far from reducing the need for the network rep rule, changes in the video marketplace support its retention. The increased number of stations increases the bargaining power of the networks, not the affiliates. There is no viable substitute for network affiliation, and affiliates' dependence on their networks gives networks substantial power over affiliates. Moreover, recently adopted and proposed Commission regulations and pending legislation will further increase the networks' power. The network rep rule's elimination could spell the end of affiliate independence.

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**COMMENTS OF THE BROADCASTERS COALITION**

Cox Broadcasting, Inc., Gray Communications Systems, Inc., Pappas Telecasting Companies and Pappas Stations Partnership, Busse Broadcasting Corp., Citicasters Co., Capitol Broadcasting Company, Griffin Television, L.L.C., WCPX License Partnership, KPDX License Partnership, WHNS License Partnership, Sinclair Broadcast Group, Inc. and Post-Newsweek Stations, Inc. (the "Broadcasters Coalition"),<sup>1/</sup> by its attorneys, submits its comments in response to the Commission's *Notice of Proposed Rule Making*<sup>2/</sup> in the above-captioned proceeding and urges the Commission to retain its network advertising representation rule, 47 C.F.R. § 73.658(i) and the network control of station advertising rate rule, 47 C.F.R. § 73-658(h) (collectively the "network rep rule" or the "rule"). The public interest basis for the rule remains unchanged, and the rule continues to serve valid and necessary purposes. The network rep rule effectively promotes competition between networks

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<sup>1/</sup> The Broadcasters Coalition operates more than 35 television broadcast stations, many of which are network affiliated. In addition, a wholly owned subsidiary of Cox Broadcasting, Inc., TeleRep, Inc., is an independent sales representative for numerous television stations.

<sup>2/</sup> In the Matter of Review of the Commission's Regulations Governing Broadcast Television Advertising, *Notice of Proposed Rule Making*, MM Docket No. 95-90 (June 14, 1995) (the "Notice").

and their affiliates in the sale of national spot advertising and protects affiliates from being coerced into accepting network programming that is not in the local public interest.

**I. Introduction.**

The *Notice* proposes to eliminate a regulation simply because the regulation is almost fifty years old. Age alone, however, is not an adequate reason to discard a rule that serves the public interest. Although there have been substantial changes in the video marketplace during the fifty years since the network rep rule was implemented, the principles underlying the network rep rule are as valid today as when it was initially adopted.

The network rep rule was designed to foster competition between network advertising and national spot advertising and to encourage localism. The increase in viewers' video programming options has not diminished the networks' ability to undermine these goals if the rule were eliminated. Without the network rep rule, networks would have every incentive and opportunity to coerce affiliates into hiring them as their representatives. This inevitably would lead to higher advertising prices as robust competition is replaced with network-enforced cooperation and collusion between the networks and their affiliates. Localism would also suffer as local television stations repped by their networks would lose the benefit of the objective programming advice now provided by independent advertising representatives.

Recent modifications of Commission regulations add to the networks' already substantial power over their affiliates; pending telecommunications legislation will, if enacted, accelerate this trend to the detriment of the public interest. Abolishing the network rep rule

would continue the erosion of affiliate independence, drastically diminishing competition. In sum, while the network rep rule is old, it is not outdated.

**II. The Commission Should Retain the Rule Prohibiting Network Control of Station Advertising Rates.**

The Commission prohibited radio networks from controlling their affiliates' advertising rates in radio service in its 1941 *Chain Broadcasting Report*.<sup>3/</sup> The *Chain Broadcasting Report* noted that improvement in the quality of electrical transcriptions made it possible for affiliates to compete with the networks for national spot advertising business.<sup>4/</sup> The networks, in response to these changes, began to stifle that competition. For instance, the Commission found that NBC added a provision to its affiliation contracts which prohibited its affiliates from charging a lower rate for national spot advertising than the rate charged by the network. The Commission determined that such contractual provisions were anticompetitive and contrary to the public interest and that their prohibition would foster improved programming. As the Commission explained: "[c]ontinuing and unrestricted competition between network and outlet for this [advertising] business will provide the public with steadily improving program service."<sup>5/</sup>

Consequently, the Commission adopted 47 C.F.R. § 73.658(h), which states:

No license shall be granted to a television broadcast station having any contract, arrangement, or

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<sup>3/</sup> Commission Order No. 37, Docket 5060 (1941), *modified, Supplemental Report on Chain Broadcasting* (1941), *appeal dismissed sub nom. NBC v. United States*, 47 F. Supp. 940 (1942), *aff'd* 319 U.S. 190 (1943) ("*Chain Broadcasting Report*").

<sup>4/</sup> *Id.* at 73.

<sup>5/</sup> *Id.*

understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

This rule plainly serves the public interest by protecting both individual stations and the public from price fixing by the networks. This rationale is still valid and requires retention of the rule. No "changed circumstance" has occurred which would prevent the networks from including such provisions in their affiliation agreements today if it were allowed. Currently, the network's prime competitor for advertisers are its affiliates' sale of national spot time. Eliminating this rule essentially would allow the networks to collude and price fix instead of compete. Such a result would be contrary to the public interest.

### **III. The Network Rep Rule Is Designed to Promote Competition in the National Advertising Marketplace.**

In 1959, the Commission applied the principles first articulated in the *Chain Broadcasting Report* by adopting the television network rep rule.<sup>6/</sup> The rule provides:

No license shall be granted to a television broadcast station which is represented for the sale of non-network time by a network organization or by an organization directly or indirectly controlled by or under common control with a network organization, if the station has any contract, arrangement or understanding, express or implied, which provides for the affiliation of the station with such network organization: *Provided, however,* that this rule shall

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<sup>6/</sup> In the Matter of Amendment of Section 3.658 of the Commission's Rules and Regulations to Prohibit Television Stations, Other than Those Licensed to an Organization Which Operates a Television Network, from Being Represented in National Spot Sales by an Organization Which Also Operates a Television Network, *Report and Order*, 27 F.C.C. 697 (adopted October 30, 1959) ("*Initial TV Rep Order*").

not be applicable to stations licensed to a network organization or to a subsidiary of a network organization.<sup>7/</sup>

The Commission was concerned that, without this rule, networks would pressure affiliates into representation agreements thereby quelling competition in the national television advertising market.<sup>8/</sup> The Commission reasoned that networks should be prohibited from representing their affiliates because network control over affiliation could "influence affiliates in their choice of spot representatives and thus restrain competition and interfere with the independent responsibilities of the station licensees involved."<sup>9/</sup>

When it adopted the rule, the Commission emphasized the value of network affiliation to an individual television station: "[w]hile it is true as a general proposition that networks need affiliated stations to provide nationwide coverage, the individual television station has a greater need, in most cases, for the network affiliation."<sup>10/</sup> The Commission also determined that, when a network serves as the advertising representative for both itself and its affiliate, it plays two roles that inherently conflict with each other and, therefore, that such arrangements stifle competition. That inherent conflict of interest remains unchanged.

The Commission reexamined the network rep rule in both 1980 and 1990. In 1980, the Commission created a staff study group to examine the effectiveness of existing

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<sup>7/</sup> 47 C.F.R. § 73.658(i) (emphasis supplied). For the purposes of this rule, the term "network organization" is any organization that provides an identical program to be broadcast simultaneously by two or more interconnected stations. See 47 C.F.R. § 73.658(a); ch. VII, J, of *Chain Broadcasting Report*.

<sup>8/</sup> *Initial TV Rep Order* at 710.

<sup>9/</sup> *Id.* at 713.

<sup>10/</sup> *Id.*

network/affiliate regulations. The *Network Inquiry Report* concluded that the network rep rule's elimination would be contrary to the public interest.<sup>11/</sup> It reasoned that allowing networks to represent their affiliates would motivate the networks to determine the prices for both network and national spot advertising to reduce competition with their affiliates.

Only five years ago in 1990, the Commission again determined that the public interest clearly favored the network rep rule's retention, rejecting the networks' arguments for its elimination.<sup>12/</sup> In holding that the rule still serves useful and valid purposes, the Commission noted that the "network representation rule protects broadcast affiliates from the networks exerting influence over affiliate programming decisions, and the rule fosters competition in the local and national broadcast television markets."<sup>13/</sup>

This *Notice* again proposes to eliminate the rule, citing recent changes in the video marketplace. However, the reasons for adopting the rule in 1959 and retaining the rule both in 1980 and 1990 still exist in 1995. When the Commission first adopted the network rep rule, its conclusions about the adverse competitive effects of networks acting as reps were not mere speculation. Rather, the Commission pointed to tangible evidence of the influence networks have over their affiliates and the networks' anticompetitive behavior when a network

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<sup>11/</sup> Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report*, (October 1980).

<sup>12/</sup> In the Matter of Amendment of § 73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales, *Report and Order*, 5 FCC Rcd 7280 (rel. Dec. 3, 1990).

<sup>13/</sup> *Id.* at 7281.

and its affiliate are expected to compete in the sale of advertising.<sup>14/</sup> Although there have been changes in the video marketplace, these changes do not affect the networks' power over their affiliates in the sale of advertising and selection of non-network programming and the inherent conflict of interest in networks acting as affiliates' reps; nor do these changes remove the networks' motivation to behave in the same manner as before the rule was adopted.

#### **IV. The Network Representation Rule Continues to Serve the Public Interest.**

The network rep rule was intended to preserve competition in the national advertising marketplace. It continues to serve that purpose. In addition, the rule assures that network affiliates have an independent source of advice on programming most suited to their individual markets. Thus, the network rep rule is an important element in the preservation of localism.

##### **A. Without the Network Representation Rule, Networks Would Coerce Their Affiliates into Representation Agreements.**

Elimination of the network rep rule effectively would eliminate the independent advertising representation business. Although network affiliates would theoretically be free to choose representatives other than one owned by their network, in practice the networks' power would make such a choice illusory. Network affiliation is vital to a television station's economic survival. As the Commission recognized in 1959 when the network rep rule was first adopted:

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<sup>14/</sup> For example, NBC's standard affiliation contract had a liquidated damages provision requiring an affiliated station to pay to NBC any increased revenue it received from an independent program substituted for a network program. *Chain Broadcasting Report* at 38.

The economic survival of the station may well depend on . . . affiliation. Network programs are not only a substantial source of direct income to the affiliated station; they also attract the viewing audience and provide valuable adjacencies for the affiliate to sell to national spot and local advertisers.<sup>15/</sup>

This is still true. While networks need affiliated stations to distribute their programming, networks still have a decisive bargaining advantage because of the value of an affiliation to stations<sup>16/</sup> A network has every incentive, as well as the ability, to require its affiliates to use the network as their representative if that were allowed.<sup>17/</sup>

**B. Elimination of the Network Representation Rule Would Reduce Competition.**

Networks' representation of their affiliates would drastically reduce competition in the advertising marketplace. At present, the market for national television advertising consists of network advertising and national spot advertising. Network advertising involves a national advertiser purchasing time on an entire network or a portion of a network. In national spot advertising, the advertiser purchases time on a group of television stations on an individual basis for either a spot announcement or an entire program. Spot advertising is

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<sup>15/</sup> *Initial TV Rep Order*, 27 FCC at 713.

<sup>16/</sup> The leverage of networks is most obvious in the 103 markets with more than four commercial television stations, including both VHF and UHF. These markets represent 49% of all Designated Market Areas and 84% of all television households. In the Matter of Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, *Notice of Proposed Rulemaking*, MM Docket No. 95-92 (rel. June 15, 1995) ("*Networks and Affiliates Notice*").

<sup>17/</sup> Even if a revised rule prohibited networks from requiring their affiliates to use networks' representation services, the networks have ample tools to make any other choice impractical.

attractive to advertisers who want to target a certain market or markets. For example, an advertiser may want to run ads only in New York City and Washington D.C. Such an advertiser would purchase spot ads in those cities instead of advertising on an entire network.

National spot and network advertising compete for a relatively fixed amount of advertising revenue, just as network and non-network programming compete for the fixed number of affiliates' broadcast hours. Reps seek to persuade national advertisers that spot time is more attractive and economically efficient than network time. By contrast, networks try to convince advertisers to purchase network time. They also offer alternatives to spot advertising such as regional network sales. Obviously, if networks began selling national spot advertising time for their affiliates, competition between networks and their affiliates for spot advertising dollars would cease. Networks would sell both their own advertising time and their affiliates' national spot advertising time. In doing so, the network would control pricing and ensure that spot advertising is more expensive than network advertising. This inevitable conflict of interest when the network competes only with itself prompted adoption of the network rep rule. Nothing has changed today. There is no "changed circumstance" that alters the fact that allowing networks to sell advertising time for themselves and their affiliates creates an inherent conflict of interest that eliminates competition.

Fostering competition is a paramount objective of Commission policy. As the Commission stated in the *Notice*, "healthy and vigorously competitive television advertising markets are in the public interest."<sup>18/</sup> Chairman Hundt emphasized the Commission's role in promoting competition in various communication markets, and stated that the "mission of

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<sup>18/</sup> *Notice* at 7.

promoting competition is a role that the FCC has already begun fulfilling."<sup>19/</sup> The network rep rule, which requires the network to compete with its affiliates in the sale of advertising, serves this overriding goal. Repealing the network rep rule would create an environment in which the only competition for advertising would be between networks.

**C. Elimination of the Network Representation Rule Would Undermine Localism.**

The network rep rule also fosters localism. An advertising representative does more than just sell advertising time; it recommends programming to individual stations. For instance, if a particular network program is not attractive to advertisers, the rep may suggest that the station seek a program better suited to the local community. In offering this advice, the rep's sole motive is the licensee's interest and that of the individual station's viewing public.

By contrast, if a network were to assume this critical advisory function, its advice inevitably would be colored by its primary role as a network program provider. It is inconceivable that a network would advise an affiliate to replace a network program with an independently-produced non-network program: to do so would be to reject advertising revenues from network programming.<sup>20/</sup> Although an independent representative may recommend against carrying a network program that is relatively unpopular in a particular

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<sup>19/</sup> Statement of Reed E. Hundt, Chairman of the Federal Communications Commission, on Reauthorization of the FCC before the Subcommittee on Telecommunications and Finance Committee on Commerce, U.S. House of Representatives (June 19, 1995).

<sup>20/</sup> Provisions in current network contracts which effectively force high clearance rates emphasize the networks' concentration on securing full clearance for all network programming.

community, a network cannot be expected to make that recommendation. Even an unpopular network program earns more advertising revenue for the network than no program at all. Thus, the critical independent advisory function of the advertising representation business would vanish if networks were allowed to represent their affiliates.

Networks already exert enormous pressure on their affiliates to carry a full schedule of network programming. In recent years networks have insisted on long-term affiliation agreements with terms that make it difficult, if not virtually impossible, for affiliates to exercise independent programming judgments. These terms have included significant financial disincentives to carry non-network programming and other provisions that effectively force affiliates to clear complete network schedules. For example, some affiliation agreements allow stations to preempt network programming only for "breaking news stories." In addition, under some affiliation agreements, a station that preempts the network more than a limited number of hours per year not only loses network compensation for the programs which it did not broadcast but must compensate the network for the station's share of any revenue lost by the network as a consequence. Network affiliates, in short, already are subject to substantial economic pressure to clear the full network schedule.

Elimination of the network rep rule would significantly increase the networks' already substantial intrusion on affiliates' operational independence. Representation would become yet another means of usurping licensees' independent programming judgments in order to guarantee carriage of network programming. This, in turn, would undermine affiliates' ability to respond to their local audience.

Like competition, localism is a fundamental Commission objective. This nation's broadcasting system is founded on the bedrock of a system of local broadcast stations obligated and committed to providing local service to their communities of license. Section 307(b) of the Communications Act of 1934, as amended, directs the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same." Consistent with this statutory obligation, Commission policies and rules stress the overriding importance of local broadcast service. For example, the Commission stated that, in determining whether a broadcast station is operating in the public interest, the Commission would consider whether there has been "a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area."<sup>21/</sup> Similarly, when the Commission eliminated its programming guidelines, it stressed that "the only programming obligation of a licensee should be to provide programming responsive to issues of concern in its community of license."<sup>22/</sup>

Independent network representation furthers the goal of tailoring programming to the individual needs of each community by providing television stations with objective advice as to the programs best suited for a particular community. Unlike a network, a disinterested, independent advisor has every incentive to recommend the television program best suited to the community because such a program will bring the station higher viewership

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<sup>21/</sup> Commission en banc Programming Inquiry. *Public Notice*, 44 FCC 2303, 2312 (1960).

<sup>22/</sup> In the Matter of the Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, *Report and Order*, 98 FCC 2d 1076, 1091 (1984).

and advertising revenues. A network, however, only has the incentive to recommend or insist on the carriage of network programming over the programs of *any* competitors.<sup>23/</sup>

**D. Eliminating the Network Representation Rule Would Harm Stations that Are Not Represented by a Network.**

As illustrated above, eliminating the network rep rule will practically ensure that the large majority of network affiliates will be represented by their networks. This will have an adverse effect not only on independent stations but also on network affiliates that insist on retaining an independent rep. Because the networks will take the majority of the business from independent reps, many of them will cease operating. The remaining independent reps will be left with fewer possible clients, likely in smaller markets, and, therefore, a lesser capacity and fewer resources to provide quality service. Affiliates who prefer not to be represented by their network must not only resist extraordinary pressure from the network to hire them as a representative, but must accept service from a weakened independent rep. The same is true for independent television stations. This inevitable result makes it even more vital to retain the network rep rule. Eliminating the rule almost certainly will drive any meaningful competition out of the marketplace and leave stations with the networks as their only representation option.

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<sup>23/</sup> With the elimination of the Syndication and Financial Interests rules and the Prime Time Access Rule, network syndicated programs as well as first-run network program product would also be the beneficiaries of network-owned reps' recommendations.

**E. Antitrust Laws Are Not an Effective Substitute for the Network Representation Rule.**

Although the *Notice* suggests that federal or state antitrust laws could effectively deter networks from anticompetitive behavior, it is plain that such laws would not be an effective substitute for the network rep rule. Antitrust violations are expensive to prosecute, rarely resolved quickly and difficult to prove, factors which decrease their practical deterrent effect. In addition, one must question whether anyone would actually sue the networks. Because of the dependent relationship between networks and their affiliates, it is highly unlikely that an affiliate could or would sue the network for an antitrust violation.

Antitrust laws also fail to address an important function of reps, the recommendation of programming. No express antitrust provision prohibits favored programming recommendations: the policies affected by such practices relate more to unique Commission goals than to the antitrust laws' exclusively economic focus. Antitrust laws do not and cannot provide an effective check on network bargaining power over affiliate programming decisions.<sup>24/</sup>

**V. Recent Changes Have Not Undermined the Purposes Underlying the Network Representation Rule.**

The changes in the fifty years since the network rep rule was adopted have not altered the structure upon which the rule was based. The network rep rule was promulgated

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<sup>24/</sup> The principles of free and open competition that underlie the antitrust laws would not be advanced by eliminating the network rep rule, which would essentially limit the provision of services to one provider. Plainly, even a second, and much more a third, fourth or fifth provider advances antitrust objectives more than does a policy that effectively diminishes additional competition.

to protect affiliates from the possibility of coercive network behavior. If anything, recent changes in both the marketplace and Commission regulations have increased the power of the networks. Because of this increase in network power, the network rep rule is as necessary today as it was fifty years ago.

**A. Changes in the Video Marketplace Increase Network Power.**

The *Notice* correctly acknowledges some obvious changes in the video marketplace: today's television viewers have access to more programming from more sources than ever before. However, the *Notice* fails to recognize that the growing or expected proliferation of cable television, video dialtone and DBS has little or no impact on the network-affiliate relationship. As demonstrated above, the considerations which prompted the network rep rule, including the networks' excessive influence over affiliates and the networks' ability to use that influence to behave in an anticompetitive manner, are structural factors that are not eliminated by increases in alternative programming distribution sources. As consumers' programming choices grow, local television stations' dependence on network affiliation *increases* proportionately. Because stations' dependence on networks continues, the need for the network rep rule is as strong today as when it was adopted in 1959.

Indeed, the only relevant change in this area since 1959 has been the entrance of Fox as a network. Two other new networks, Warner Bros. and United Paramount Network, cannot now seriously be considered alternatives to the major networks. Currently,

Warner Bros. carries programming only one day a week and United Paramount Network carries programming but two days a week.<sup>25/</sup>

Cable television, DBS and video dialtone are not substitutes for network affiliation for broadcast stations or advertisers. Even the most highly rated cable programs cannot compete with even a low rated network show.<sup>26/</sup> Cable television, DBS and video dialtone similarly, are not substitutes for networks in the advertising market. Broadcast television earns the vast majority of its revenue through mass advertising. In contrast, cable television, DBS, and video dialtone earn (or when they are developed can be expected to earn) the majority of their income through program distribution revenues. Cable services are usually directed to a small, focused group of viewers. such as ESPN, A&E, and Nickelodeon. Although these are popular cable services, they are watched by many fewer viewers than the networks.<sup>27/</sup> Therefore, it is much more attractive for a mass advertiser to spend money advertising on a network than on a cable channel. Its message almost certainly will reach more consumers.

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<sup>25/</sup> In fact, both networks have substantially revised their programming schedules for the Fall 1995 season. David Tobenkin, *WB, UPN Explain Fall Fixes*, BROADCASTING & CABLE, July 31, 1995 at 18.

<sup>26/</sup> For example, for the week of July 31 to August 6, 1995, the number one cable program received 3.9 percent of the television household market. On network television, the 80th most popular program received 4.3 percent. See, e.g. Nielsen Ratings, BROADCASTING & CABLE, Aug. 14, 1995 at 19, 22.

<sup>27/</sup> For example, in the most recent quarter the top-rated cable service, Nickelodeon, only received a 1.4 rating, compared to a 10.1 rating for CBS, which is the lowest rated of the three largest networks. Rich Brown, *Ratings for 2nd Quarter 1995*, BROADCASTING & CABLE, July 3, 1995 at 20.

The vast difference in broadcast versus cable advertising revenue also increases the necessity for local stations to affiliate with networks. As the Commission noted in the appendix attached to its *Notice*, in 1993 advertisers spent \$7.8 billion on national spot advertising, versus \$1.97 billion on all cable advertising combined. Therefore, a television station will earn many more advertising dollars affiliating with a network than it will by "affiliating" with a cable system.

Far from minimizing stations' dependence on network affiliation, the changing video marketplace has made a network affiliation even more critical to a station's success. The growing number of television stations increases the bargaining power of the networks. If an affiliate does not accede to a network's demands, the network can easily take its programming—and compensation—elsewhere. In addition, the growing number of stations makes "branding" proportionately more vital to a station's economic health.<sup>28/</sup> With the increase in viewing options, it is even more important for stations to have a brand that consumers can identify, such as network affiliation.<sup>29/</sup>

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<sup>28/</sup> For example, WRC-TV, channel 4 in Washington D.C., has recently changed its long-standing campaign "Working 4 You" to "NBC4 Working for You." The general manager of WRC attributed the change to the tremendous strength of the initials NBC. John Carmody, *The TV Column*, THE WASHINGTON POST, August 25, 1995, at D4.

<sup>29/</sup> The importance of network affiliation to television stations contrasts with the current relationship between radio stations and radio networks. Radio stations typically generate most of their own programming and use network programming for only a small part of the programming day. They often affiliate with multiple networks and freely choose what programming they will run. In other words, radio is essentially a local rather than broadcast network business, particularly in the sale of advertising and program selection. Accordingly, there is no need for a radio network rep rule. Today's television stations, however, face an environment nearly identical to that experienced by radio stations in 1941, when network affiliation was quite important to a radio station's survival and when rules like the network rep rule were necessary to protect local stations from network power.

The Commission also must consider the recently announced mergers and other possible mergers between networks and programming distributors. For example, Disney's announced purchase of Capital Cities/ABC is intended to give it "a guaranteed platform for its first-run syndication programs . . . as well as a platform to advertise other Disney properties from theme parks to films."<sup>30/</sup> Not only will ABC broadcast Disney programming, but elimination of the network rep rule will allow Disney to control the programming on many other if not all ABC-affiliates.

**B. Recent and Possible Rule Changes Increase Network Power.**

Recent Commission decisions and pending legislation also will increase the networks' power. The effects of these regulatory changes strengthen the case for retaining the network rep rule.

For example, the Commission recently eliminated the Prime Time Access Rule ("PTAR").<sup>31/</sup> PTAR's elimination will simply increase the portion of local stations' broadcast day that can be devoted to network programming. The Commission is expected to eliminate its remaining fin/syn restrictions earlier than its November deadline, giving each network additional opportunities and incentives to distribute such programs.<sup>32/</sup>

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<sup>30/</sup> Michael Oneal, *Disney's Kingdom*, BUSINESS WEEK, August 14, 1995 at 30.

<sup>31/</sup> In re Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, *Report and Order*, MM Docket No. 94-123 (rel. July 31, 1995). PTAR prohibited stations affiliated with the ABC, CBS or NBC networks in the top 50 prime time markets from broadcasting more than three hours of network programming or off-network programming during the four hours of prime time.

<sup>32/</sup> *Final fin-syn rule about to fall*, BROADCASTING & CABLE, August 28, 1995, page 8.

Proposed modifications in other Commission rules, if adopted, also would further increase network power over affiliates. In June the Commission issued a *Notice of Proposed Rulemaking* to review many of its rules governing the network-affiliate relationship.<sup>33/</sup> For instance, the Commission proposed to weaken substantially the right to reject rule that protects affiliates from being contractually obligated to air network programming. The time-option rule, which prohibits a network from optioning an affiliate's broadcast time without actually committing to use that time, also is being considered for elimination. Either or both of these modifications would further increase networks' bargaining power vis-a-vis their affiliates.

Another potential source of increased network power is the pending Congressional legislation. Both the House and Senate telecommunications bills would increase the number of stations that networks are allowed to own by allowing any single entity to own stations that reach 35% of an aggregate national audience.<sup>34/</sup> Accordingly, even without eliminating the network rep rule, networks will be able to represent owned and operated stations covering 35% of the nation's audience and virtually all major markets.

In sum, instead of increasing affiliates' independence, recent and proposed regulatory and market changes increase affiliates' dependence on the networks. These changes must inform the Commission's decision in this proceeding: the network

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<sup>33//</sup> See *Networks and Affiliates Notice*.

<sup>34//</sup> See S. 652, H.R. 1555, 104th Cong., 1st. Sess. (1995). The Commission also is considering similar modifications in its own ownership proceeding. See *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rulemaking*, MM Docket No. 91-221 (rel. Jan. 17, 1995),

representation rule cannot be considered in a vacuum. Pending legislation, recent and proposed Commission decisions, and newly-executed long-term affiliation agreements all afford the networks substantial power and control over their affiliates. There can be no question that, if the network rep rule were eliminated, the networks would use this power to coerce affiliates into hiring network-owned reps.

**C. Eliminating the Network Representation Rule Will Not Serve the Public Interest.**

The network rep rule serves the public interest by promoting competition in television advertising and localism in broadcasting. It is unclear therefore, what public interest objective is served by eliminating the network rep rule. Advertisers certainly would not be served because they no longer would have the benefit of competition between network and affiliate. Individual stations would not be served because they would be forced to hire the network as their representatives. Communities certainly would not be served because elimination of the network rep rule would make it more difficult for local stations to preempt network programming in order to cater to each communities' particular needs. The only interest served by eliminating the network rep rule is the networks' interest in increasing their profits and power over affiliate programming decisions.